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No. 77-742

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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JEROME MILLER, ET AL., APPELLANTS

*v.*

MARCEL YOUAKIM, ET AL.

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*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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## QUESTION PRESENTED

Whether a state may deny foster care benefits under Section 408 of the Social Security Act, as added, 75 Stat. 76, and amended, 42 U.S.C. 608, to otherwise eligible children who have been placed in the foster care of relatives.

## INTEREST OF THE UNITED STATES

This case concerns the availability of foster care aid under Section 408 of the Social Security Act for children who have been removed from their homes by a court order and placed, with the approval of the

appropriate state agency, in the care of a relative of the children. The Secretary of Health, Education, and Welfare, who administers the Social Security Act, has concluded that, under the statute, foster care benefits must be paid when foster care is provided by relatives (A. 48-50). The Illinois statute and policies challenged here, however, refuse payment of foster care benefits in this situation. Ill. Ann. Stat. ch. 23, §§ 2212.05, 2212.17 (1977 Cum. Supp.).

This litigation has been before the Court once before. *Youakim* v. *Miller*, 425 U.S. 231. At that time, the United States filed a memorandum as *amicus curiae* in response to the Court's invitation (see A. 51-56). The Court's decision necessarily will affect the duties of the Secretary, and the United States therefore has a continuing interest in the case. We file this brief to supplement our previous memorandum.

## STATEMENT

Illinois participates in the federally subsidized program for aid to families with dependent children (AFDC) established in Title IV of the Social Security Act, 49 Stat. 627, as amended, 42 U.S.C. 601 *et seq.* The basic AFDC program (Section 406 of the Act, 42 U.S.C. (and Supp. V) 606) provides aid to families of qualified dependent children who are living with their parents or with certain specified relatives. Under Section 408, which was added to the Act in 1961, the AFDC program also provides foster care aid (AFDC-FC) for dependent children who have



been removed from their homes by court order and placed in a foster family home or child care institution. In implementing these federal aid programs, Illinois grants foster care aid when the foster care is provided in an institution or in the home of a person who is not related to the dependent child. Ill. Ann. Stat. ch. 23, §§ 2212.05, 2212.17 (1977 Cum. Supp.). When the foster child is cared for in the home of a reative, however, the State provides assistance only under the basic AFDC program.[1]

Appellees are foster parents caring for children related to them, and the children themselves. They brought the suit as a class action, contending that the Illinois statute, and implementing policies, violate the Equal Protection Clause. A three-judge court rejected these contentions and dismissed the suit (374 F. Supp. 1204; J.S. App. E). After the district court had made its decision, the Department of Health, Education, and Welfare (HEW) issued Program Instruction APA-PI-75-9 (A. 48-50), which provides that

> [w]hen a child has been removed from his home by judicial determination and is place in foster care under the various conditions specified [in Section 408 of the Act], the foster care rate

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[1] AFDC-FC payments in Illinois are $105 per child per month, without respect to individualized determinations of need (Miller Br. 14). The state's basic AFDC payments are $63 per child per month but may be supplemented to a total of $105 per month on a showing of need by relatives who are caring for dependent children (*ibid.*).

> of payment prevails regardless of whether or not the foster [care] home is operated by a relative.

In light of this administrative interpretation, this Court vacated the judgment of the district court and remanded for further consideration of the contention, raised on appeal, that the Illinois practice violates federal law. 425 U.S. 231.

On remand the district court held that the challenged Illinois statute, and the implementing policies and procedures of the Illinois Department of Children and Family Services, are contrary to the Social Security Act, federal regulations, and Program Instruction APA-PI-75-9, and are therefore invalid under the Supremacy Clause of the Constitution (431 F. Supp. 40; J.S. App. B21-B31). The court pointed out that, under the plain terms of the federal statute, children in "foster" homes are eligible for AFDC-FC benefits, and that appellees' home had been approved by Illinois as a foster home (J.S. App. B28). The court also relied on the HEW Program Instruction as "persuasive authority" (*id.* at B29) and concluded that the legislative history of the statute supports the position taken by the agency (*id.* at B30-B31).

The court of appeals affirmed (562 F.2d 483; J.S. App. B1-B20). The court adopted the opinion of the district court (J.S. App. B5) and added several further observations. It pointed out that payments under AFDC-FC would be available at least if a state approves a particular home as a foster family home, and it concluded that Illinois had so approved appellees' home in all but name (*id.* at B8-B13). The court also observed that appellants' reading of other portions of the federal statute exalted form over substance (*id.* at B13-B16).



## SUMMARY OF ARGUMENT

A state that has elected to participate in the AFDC program must provide foster care aid to all eligible persons. 42 U.S.C. (and Supp. V) 602(a)(10), (20). Under Section 408 of the Social Security Act, foster care aid is to be provided to a dependent child who has been removed from his home by a judicial order and placed by the state in the "foster family home of any individual * * *." 42 U.S.C. 608(a), (b)(1). Because foster care provided by relatives, as well as by non-relatives, falls within the scope of the federal definition of eligibility, relatives providing foster care are entitled to foster care aid under Section 408.

Appellants concede that foster care provided by relatives is within the literal scope of the eligibility criteria in Section 408. They argue, however, that the legislative history of the federal foster care program indicates that relatives providing foster care are eligible for assistance only under the basic AFDC program in Section 406, and are not eligible for foster care aid under Section 408. But the legislative history of Section 408 supports the conclusion that foster care by relatives is included within the federal foster care program. The objectives of Section 408 are to provide the most suitable possible care for foster children and to establish a remedial environment to

correct the history of neglect endured by foster children prior to their removal from their parents' home by judicial order. Foster care provided by relatives contributes significantly toward achieving these objectives, and it would therefore be anomalous to conclude that Congress intended to exclude foster care by relatives from the federal foster care program. Moreover, a relative who provides foster care incurs obligations identical to those assumed by other foster parents under state law. Relatives and non-relatives providing foster care thus have equal need for the higher foster care payments that Congress has established in recognition of the higher costs associated with state-supervised foster care.

The Secretary of Health, Education, and Welfare has adopted an interpretive rule under Section 408 that confirms that foster care provided by relatives is included within the scope of the federal foster care program. The agency's rule provides that, if other eligibility standards are met, foster care eligibility will exist "regardless of whether the * * * foster family home in which a child is placed is operated by a relative * * *" (A. 49). This is the agency's only official national interpretation concerning the coverage of relatives providing foster care under Section 408, and the rule has been consistently applied by the agency since it was promulgated in 1974. In view of the substantial support in the language and history of the Act for the agency's determination that foster care provided by relatives is within the scope of Section 408, the agency's interpretation is entitled



to significant deference and should be upheld in this case.

## ARGUMENT

### Foster Care Benefits Are Not Limited To Children In The Care Of Unrelated Persons

1. Once a federal standard of eligibility has been defined under the Social Security Act, "a participating State may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional." *Burns* v. *Alcala*, 420 U.S. 575, 580. See *Carleson* v. *Remillard*, 406 U.S. 598; *Townsend* v. *Swank*, 404 U.S. 282; *King* v. *Smith*, 392 U.S. 309. Congress has made it clear that, once a state has elected to participate in the basic AFDC program, state participation in the AFDC-FC program is mandatory and the state must provide foster care aid to all eligible persons. Section 402(a)(20) of the Act, 42 U.S.C. (and Supp. V) 602(a)(20), provides that

> [a] State plan for aid and services to needy families with children must * * * (20) effective July 1, 1969, provide for aid to families with dependent children in the form of foster care in accordance with section 408 of [the Act] * * *.

Section 402(a)(10), 42 U.S.C. (and Supp. V) 602(a)(10), states further that the state plan must provide aid "to all eligible individuals." Accordingly, if foster care provided by relatives is "foster care in accordance with section 408 of [the Act]," the states may not deny AFDC-FC assistance when an eligible child is placed in the foster care of a relative.

2. Section 408 sets forth several criteria for determining eligibility for foster care assistance.[2] The three essential requirements are:

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[2] Section 408(a) of the Social Security Act, as added and amended, 42 U.S.C. 608(a), provides:

> Effective for the period beginning May 1, 1961—
>
> (a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child (1) who would meet the requirements of such section 606(a) or of section 607 of this title except for his removal after April 30, 1961, from the home of a relative (specified in such section 606(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) whose placement and care are the responsibility of (A) the State or local agency administering the State plan approved under section 602 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of such State plan has made an agreement which is still in effect and which includes provision for assuring development of a plan, satisfactory to such State agency, for such child as provided in paragraph (f)(1) and such other provisions as may be necessary to assure accomplishment of the objectives of the State plan approved under section 602 of this title, (3) who has been placed in a foster family home or child-care institution as a result of such determination, and (4) who (A) received aid under such State plan in or for the month in which court proceedings leading to such determination were initiated, or (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) in the case of a child who had been living with a relative specified in section 606(a) of this title within 6 months prior to the month in which such proceedings were initiated, would have received such aid in or for such month if in such month he had been living with (and removed from the home of) such a relative and application had been made therefore.



> (i) the child was previously eligible for AFDC aid and living in the home of a parent or relative (as that term is defined in Section 406 (a))[3], but has been removed from that home as "a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of [the] child;"
>
> (ii) the placement and care of the child are the responsibility of the State or an agency designated by the State; and
>
> (iii) the child has been placed in a foster family home or child-care institution.

Every court that has considered the issue has concluded that dependent children who have been removed from their homes by judicial order and placed by the state in the homes of relatives satisfy the cri-

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[3] Section 406(a) of the Act, 42 U.S.C. 606(a) provides:

> When used in this part—
>
> (a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment.

teria for eligibility under Section 408 and are therefore entitled to foster care assistance.[4]

Appellants concede that foster care by relatives as well as by non-relatives is within the literal scope of the eligibility criteria in Section 408 (J.S. 11; J.S. App. B7). They argue, however, that despite the evident breadth of Section 408, Congress did not intend that foster care provided by relatives would be included in the AFDC-FC program. Appellants contend (a) that the history of the 1961 legislation creating the AFDC-FC program indicates that coverage is cleanly bifurcated—that care by relatives is covered under the basic AFDC program in Section 406, while foster care by non-relatives is covered under Section 408; (b) that the statutory phrasing of certain portions of Section 408 would be anomalous if foster care by relatives were included in the AFDC-FC program; and (c) that, in any event, Congress left it to the states to determine licensing and approval standards for "foster family homes," and Illinois has adopted standards under which relatives

[4] In addition to the instant case, see *Jones* v. *Davis*, D. Ore., Civil No. 76-805, decided January 31, 1977, appeal docketed, C.A. 9, No. 77-2254; *Clampett* v. *Madigan*, S.D. S.D., decided May 24, 1973, [1972-1974 T.B.] CCH Pov. L. Rep. ¶ 17,979; *Jackson* v. *Ohio Department of Public Welfare*, N.D. Ohio, Civil No. C72-182, decided April 17, 1972; *Alston* v. *Department of Health and Social Services*, Cir. Ct. Wisc., decided January 21, 1976, [1974-1976 T.B.] CCH Pov. L. Rep. ¶ 22,336; *Thompson* v. *Department of Health and Social Services*, Cir. Ct. Wisc., decided January 9, 1976, [1974-1976 T.B.] CCH Pov. L. Rep. ¶ 22,303; *Taylor* v. *Dumpson*, Sup. Ct. N.Y., decided October 17, 1974, [1974-1976 T.B.] CCH Pov. L. Rep. ¶ 20,244.



cannot provide foster care. None of these contentions is persuasive.

*a.* The basic AFDC program in Section 406 of the Act provides eligibility only for needy children who are living with their parents or with certain specified relatives. Prior to the enactment of Section 408, a needy child removed from the home of his parent or relative and placed in the home of a non-related person thus lost his eligibility for aid under the AFDC program. Appellants are therefore correct in observing (Br. 20) that, in enacting Section 408, Congress was principally concerned to assure that a foster child would continue to be eligible for federal assistance after the child had been removed from his home by judicial order. See S. Rep. No. 165, 87th Cong., 1st Sess. 6 (1961).

But this was not the single objective of the legislation. The underlying purpose of the foster care program is to assure that proper "remedial action" is taken when a child is removed from his home by judicial order, and that the child is placed in the most suitable possible care. S. Rep. No. 165, *supra*, at 6; 107 Cong. Rec. 6388 (1961) (Senator Byrd). There is no suggestion in the legislative history that Congress meant to enforce a neat bifurcation in the AFDC program so that relatives would not be proper foster parents under Section 408. Indeed, it would have been anomalous for Congress to have enacted Section 408 to provide the most suitable possible care for foster children, but then to exclude foster care by relatives from the coverage of that program. In-

stead, the language of Section 408 supports the conclusion that foster care by relatives is included within the AFDC-FC program by stating that foster care may be provided "in the foster family home of any individual * * *." Section 408(b)(1), 42 U.S.C. 608 (b)(1).

When Section 408 was first enacted, federal matching payments under the basic AFDC program in Section 406 were identical to those under the AFDC-FC program in Section 408. S. Rep. No. 165, *supra*, at 6. Accordingly, it was not a matter of concern at that time whether foster care provided by relatives was included within the AFDC-FC program or only within the basic AFDC provision.[5] The scope of AFDC-FC coverage became significant in this regard only in 1967, when Congress amended the Act to provide more favorable federal matching payments to the states for assistance to foster families. See Section 403(a)(1)(B) of the Social Security Act, as amended, 42 U.S.C. 603(a)(1)(B); S. Rep. No. 744, 90th Cong., 1st Sess. 286 (1967). Congress determined in 1967 that federal matching payments for foster care should be increased because foster care is relatively "more costly" than unsupervised care in the child's own home. S. Rep. No. 744, *supra*, at 164.

The history of the 1967 amendment reinforces the conclusion that Congress did not differentiate between

[5] By regulation, HEW had provided for AFDC eligibility for a relative caring for a child held in the legal custody of a state agency. 45 C.F.R. 233.90(c)(1)(v)(B). This regulation encompassed the situation where the state had placed the child with the relative under a foster family agreement.



foster care by relatives and non-relatives in enacting Section 408. The reasoning adopted by Congress in increasing foster care assistance applies equally to foster care provided by relatives and by non-relatives, because relatives and non-relatives alike are subject to extra costs resulting from the acceptance of foster care responsibilities. For example, under the "Relative Home Placement Agreement" between Illinois and the appellees in this case (A. 20-23), appellees have accepted obligations to conform to the state foster care requirements for medical and dental health, general care and clothing, and religious training of the foster children. Moreover, foster parents—whether relatives or non-relatives of the children—accept a continual supervisory role by the state as a condition of the placement of the foster children (*ibid.*). As the district court found in this case, a relative providing foster care incurs "identical obligations as all other foster parents" in the state (J.S. App. B28).[6]

[6] Appellants argue that certain language in the 1967 Senate Report indicates that Congress intended foster care by relatives to be outside the scope of the AFDC-FC program (Br. 23-24). There is additional language that appellants overlook, however, that materially modifies the conclusion appellants would draw.

The Committee stated first that persons providing foster care for children removed from their homes by judicial order would be entitled to receive the higher AFDC-FC aid payments under the amended Act. S. Rep. No. 744, *supra*, at 163-164. The Committee then noted that Section 406 would also allow relatives who "are not legally responsible for support" to receive basic AFDC benefits when they care for children

Furthermore, the additional AFDC-FC resources made available under the 1967 legislation contribute importantly to the remedial objective of the federal foster care program—an objective that applies with equal force whether the foster care is provided by relatives or non-relatives. When a child is removed from his home as the result of a judicial determination that the child has been abused or neglected, it is important that the child's new environment be one that can heal and correct the scars of the past. See S. Rep. No. 165, *supra*, at 6. The need for additional AFDC-FC resources to provide a remedial environment for a foster child is related to the child's status as the subject of substantial prior neglect, and is not related to the foster parent's status as a relative or non-relative of the child.

*b.* Appellants maintain (Br. 22-23, 29) that Section 408(f)(1) demonstrates that Congress did not intend to define care by relatives as eligible foster care. This Section provides that the state foster care plan must ensure that each child is receiving proper care and that

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"who have no parents or who are not able to live with their parents." *Id.* at 164. Read in its context, this explanation falls far short of an assertion that a relative who assumes legal responsibilities as a foster parent under state law, and who cares for a child who has been removed from his home by a judicial order, is not entitled to the higher assistance payments provided by the foster care program. Indeed, as is discussed in the text, the express congressional objective in enacting higher assistance rates for the AFDC-FC program supports the inclusion of foster care by relatives within Section 408.



> services are provided which are designed to improve the conditions in the home from which he was removed or to otherwise make possible his being placed in the home of a relative specified in section 406(a) of this title.

The Section expresses a preference for the return of children to their own homes or the transfer of their care to the home of a relative. Appellants argue that Congress could not have intended to make relatives eligible for foster care aid under Section 408 if the states are required by that Section to seek transfer of the child to his own home or to the home of a relative.

As the court of appeals correctly held (J.S. App. B13-B16), however, there is no anomaly in this provision. Section 408(f)(1) requires only that, after placing a child in a foster family home, the state must provide services toward the eventual transfer of the child to the home of his parents or relatives. If the child is initially placed in the foster care of a relative, the state may still satisfy this requirement by providing appropriate services that help achieve the ultimate objective of returning the child to his parent's home. Section 408(f)(1) is thus consistent with the conclusion that foster care by relatives is within the scope of the AFDC-FC program.

Appellants' argument based on Section 408(f)(1) simply *assumes* that the transfer of a child to the home of a relative terminates coverage under AFDC-FC. That begs the question presented by this case. For the reasons discussed at pages 11-14, *supra*, it

seems most likely that Section 408(f)(1) expresses a congressional preference for foster care by relatives over foster care by strangers. Nothing in the idea of such a preference indicates that care by relatives is outside the scope of AFDC-FC.[7]

*c.* Congress defined the term "foster family home" in Section 408 to mean

> a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing homes of this type, as meeting the standards established for such licensing * * *.

Appellants contend (J.S. 16-17) that this provision permits a state to apply its licensing and approval criteria for "foster family homes" in a way that excludes foster care by relatives.

The definition of "foster family homes" in Section 408 requires only that the home be "licensed" by the state or "approved" by the state as meeting the standards for licensing. The district court properly found

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[7] Coverage under AFDC-FC would cease, however, if the transfer were to the child's parents, or if the transfer were accompanied by a dissolution of the court's supervision of the child. But these circumstances would amount to the discontinuation of one of the explicit criteria of eligibility under Section 408(a). States that carry out their duties under Section 408(f)(1) thus often will terminate AFDC-FC coverage, but that termination occurs only insofar as the movement of children under Section 408(f)(1) affects the criteria of Section 408(a). This gives substantial importance to the rule of Section 408(f)(1) while at the same time honoring the explicit eligibility rules.



that Illinois has "approved" appellees' home as a "foster family home" by entering into a placement agreement with appellees that states (A. 21; J.S. App. B28; see *id.* at B11):

> [t]he Division of Child Welfare, Department of Children and Family Services, has approved the home of Mr. and Mrs. Marcel Youakim, address 1720 Mannheim Rd., Des Plaines, Ill., for the care of a foster child * * *.

Because Illinois has approved the appellees' home under the state's foster care standards, this case does not present the question whether the state could apply its licensing standards to deny foster care approval (and AFDC-FC eligibility) to all relatives with whom foster children are placed. We observe, however, that a participating state may not erect narrow classifications that have the design or effect of denying AFDC-FC aid to persons that Congress has made eligible (*Carleson* v. *Remillard*, *supra*, 406 U.S. at 601, 604; *Townsend* v. *Swank*, *supra*, 404 U.S. at 285); it is therefore doubtful that a state could deny coverage simply by refusing to apply the label "foster" to care that otherwise meets its standards for care by persons other than the child's parents.

3. HEW Program Instruction APA-PI-75-9 confirms that foster care by relatives is included within the scope of Section 408. The instruction provides that when a dependent child is removed from his home by a judicial order and placed in a foster home by a state agency, AFDC-FC eligibility will exist "regardless of whether the * * * foster family home in

which a child is placed is operated by a relative * * *" (A. 49). This Court already has held that the Program Instruction, as an "interpretation of a statute by an agency charged with its enforcement[,] is a substantial factor to be considered in construing the statute" (425 U.S. at 235).

Appellants assert that this Program Instruction conflicts with other HEW pronouncements and is therefore entitled to little weight (Br. 32-37). Appellants rely heavily on the fact that an inconsistent interpretation of Section 408 had been issued prior to the 1974 instruction in a letter sent to Illinois officials by a regional HEW official (Br. 32-37, S26-S28).[8] This letter was not, however, approved by HEW's General Counsel or by any departmental official in the national office.[9] Moreover, other states

[8] Appellants also assert that 45 C.F.R. 233.90(c) (1) (v) (B) is inconsistent with the 1974 Program Instruction because the regulation provides for basic AFDC eligibility for a family that cares for a related child who is in the legal custody of a state agency (Br. 33-35). As we discuss in note 5, *supra*, this regulation would provide AFDC coverage for families providing foster care for related children. But AFDC eligibility in this situation is not inconsistent with the conclusion in the 1974 Program Instruction that foster care by relatives is included under the AFDC-FC program. AFDC-FC eligibility may, in these circumstances, overlap with basic AFDC eligibility, and the foster family is entitled to elect the higher level of assistance. See 45 C.F.R. 206.10(a) (1) (i) (each eligible person "may apply under whichever of the State plans he chooses").

[9] See the letter from the office of HEW's General Counsel that we have attached as an appendix to this brief. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, on which appellants rely



were informed prior to 1974 that foster care by relatives *was* included within the AFDC-FC program, and matching foster care payments were made available to these states. The 1974 Program Instruction was thus issued "to resolve the problem of some States not licensing or approving the homes of non-legally liable relatives as foster care homes [under the AFDC-FC program]" (A. 48). The agency's 1974 Program Instruction is its first and only official national interpretation concerning the coverage of foster care by relatives under Section 408, and it has been consistently applied since its promulgation.

Recognition of HEW's significant role as the agency charged by Congress with the responsibility for implementing the Social Security Act supports the proposition that the agency's determination concerning the scope and objectives of the AFDC-FC program "should be followed unless there are compelling indications that it is wrong * * *." *New York Department of Social Services* v. *Dublino*, 413 U.S. 405, 421, quoting *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381. See also *Dandridge* v. *Williams*, 397 U.S. 471, 481-482. Measured against this standard, which applies at least when the agency's position is fully explained and there is substantial support for the agency's interpretation,[10] the agency's determination that foster

(Br. 33) is therefore inapposite, because the "earlier pronouncement" involved in that case had been an official opinion letter by the agency's General Counsel. 429 U.S. at 142-143.

[10] See *Securities and Exchange Commission* v. *Sloan*, No. 76-1607, decided May 15, 1978, slip op. 13-15.

care by relatives is included within the AFDC-FC program is reasonable and should be upheld by this Court.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*

KENT L. JONES,
*Assistant to the Solicitor General.*

JUNE 1978.



## APPENDIX

### DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

December 22, 1976

Richard L. Ryan
Special Assistant Attorney General
Office of the Attorney General
State of Illinois
160 North La Salle Street
Chicago, Illinois 60601

Re: *Youakim* v. *Miller*

Dear Mr. Ryan:

Mr. Barnard Genis wrote to Secretary Mathews on August 25. That letter raised several questions regarding the substance of a Departmental interpretation of Section 408(a) of the Social Security Act (AFDC-FC) which was articulated in program instruction APA-PI-75-9, issued on October 25, 1974. Mr. Genis requested that we communicate any response to you. On October 18, Robert Jaye of this Office wrote to Mr. Genis explaining the delay in responding to his letter, and informing him that a response would be forthcoming shortly. This letter constitutes that response.

The program instruction referred to by Mr. Genis provides that "[w]hen a child has been removed from his home by a judicial determination and is placed in foster care under the various conditions specified

in Section 408 of the Social Security Act and 45 CFR 233.110, the foster care rate of payment prevails regardless of whether or not the foster home is operated by a relative." Mr. Genis indicated in his letter that the United States District Court for the Northern District of Illinois relied upon this instruction when it invalidated an Illinois policy of paying otherwise eligible foster children who were residing in foster care with relatives at the regular AFDC rate.

Specifically, Mr. Genis asked if this program instruction truly reflects the Department's position on the payment of AFDC-FC benefits to foster children residing with relatives. The answer, of course, is that it does.

Mr. Genis also asked whether the requirements contained in a program instruction are mandatory, and if so, why they are not issued in the form of regulations or guidelines.

The Administrative Procedure Act provides that:

> "*Except to the extent that a person has actual and timely notice* of the terms [of substantive rules or statements of general policy or *interpretations of general applicability* formulated and adopted by the agency], a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 USC 532(a)(1). (Emphasis supplied.)

The underscored language clearly implies that any interpretation of general applicability of which an



individual has actual knowledge will be binding upon that person, irrespective of publication in the Federal Register.

Program instructions fall under the ambit of this provision since they constitute the Department's interpretation of the Social Security Act or implementing regulations. These interpretations were forwarded to all States upon issuance. Accordingly, while they are in effect, they are binding upon all States. Program instructions also bind the Department to administer the Act and implementing regulations in a manner consistent with those interpretations. Thus, to use the example of the program instruction cited in Mr. Genis' letter, Illinois would be out of compliance with the Act and regulations as interpreted by the Department, if the State were to pay the regular AFDC rate on behalf of children who met all the eligibility conditions of Section 408, and who were placed with relatives.

With regard to why these instructions are not issued in the form of regulations, the Administrative Procedure Act at 5 USC 553, contains general requirements for publication of proposed rulemaking, an opportunity for comment thereon, and publication of the basis and purpose for the adoption of *substantive* rules except when otherwise specified by statute. However, clause (b)(A) of that provision *exempts* "*interpretative rules*" from those requirements. Since program instructions are interpretations of the Act or regulations as opposed to substantive rules, they

are exempt from these requirements, and need not be promulgated through formal rulemaking procedures.

Finally, Mr. Genis attached a March 10, 1971, letter from the Acting Regional Commissioner, SRS, to an official of the Illinois Department of Public Aid which articulated a position on this matter at variance with the interpretation espoused in the program instruction. That letter indicated that the Department did not require States to make payments at the AFDC-FC rate to otherwise eligible children in foster care who were residing with relatives. Mr. Genis questioned why the Department reversed the Federal government's previous position when it issued the program instruction. Our research does not divulge the existence of any policy issued by the Central Office of HEW on the matter at the time the Regional Office letter was written. That letter, therefore, only constituted the views of the Regional Commissioner on the proper interpretation of the statute. Accordingly, the program instruction did not reverse the Federal government's position on the matter, but rather, for the first time stated a national interpretation.

I hope this letter answers the questions raised by Mr. Genis.

Sincerely yours,

Galen D. Powers
Assistant General Counsel

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